Mashkon bin Hj Samuri v Orang Kampung Holdings (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–639–04 OF 2014
DAVID WONG, ABANG ISKANDAR AND VERNON ONG JJCA
26 JANUARY 2016

Labour Law — Employment — Dismissal — Industrial Court decided appellant's dismissal without just cause or excuse — High Court quashed Industrial Court's decision — Whether case of appellant's dismissal established by respondent — Whether dismissal just cause or excuse — Whether Industrial Court could depart from decision of respondent employer — Whether Industrial Court committed jurisdictional error

The appellant was terminated from his service as the respondent's employee based on three original charges and 11 new charges founded by the respondent against the appellant. Dissatisfied with the respondent's action, the appellant referred the case to the Industrial Court ('the IC') in which the IC found in favour of the appellant and held that the appellant had been dismissed without just cause or excuse. The respondent's application for judicial review was allowed by the High Court, hence this appeal. The issues for consideration were: (a) whether a person who had been punished with a warning could not be punished for the same offence with dismissal; (b) whether the respondent was in the best position to determine seriousness of the misconduct of the appellant; (c) whether the learned High Court judge erred in holding that all 11 new charges were not pleaded; (d) whether the evidence of the six witnesses brought by the appellant had been considered by the IC; (e) whether the issue of condonation was the determining factor by the IC in allowing the appellant's claims; and (f) whether the learned High Court judge erred in failing to appreciate that the failure to hand over duty by the appellant exposed the respondent to losses such as judgment in default and court's action.

Held, allowing the appeal with costs of RM15,000 here and below; setting aside order of the High Court; and reinstating and restoring the award of the IC:

(1) It is not allowed in law to penalise the appellant twice for the same offence. With regards to proportionality of punishment, such right is no longer residing within the exclusive province of the employer in the private sector employment. The learned High Court judge erred in holding that the 11 charges were not pleaded as such charges were in fact pleaded but the material facts of the said charges were not pleaded. It is

trite that pleadings require that the material facts be pleaded. The award of the learned chairman of the IC showed that she had indeed taken into account the evidence of the witnesses and the complaint of condonation was not the main reason for the granting of such award. Based on evidence, the respondent failed to show that failure to hand over duty properly had exposed the respondent to various unfavourable legal actions. On totality, the case for dismissal of the appellant had not been established by the respondent; hence the dismissal was without just cause or excuse (see paras 9–10, 18–19, 22–23, 25 & 28).

(2) The learned chairman of the IC had correctly exercised her duty in inquiring into the propriety of the reasons that were advanced by the respondent when it decided to dismiss the appellant. She had the necessary jurisdiction to depart from the punishment that was meted out by the employer as the circumstances warranting such a drastic punishment were not established by the respondent before her. As she had not committed any jurisdictional error, it was therefore not open for the learned High Court judge to disturb her award by issuing a certiorari to quash the same (see para 28).

[Bahasa Malaysia summary

Perayu ditamatkan daripada perkhidmatannya sebagai pekerja responden atas tiga tuduhan asal dan 11 tuduhan baru yang didapati oleh responden terhadap perayu. Tidak puas hati dengan tindakan responden, perayu merujuk kes kepada Mahkamah Perusahaan ('MP') di mana MP memihak perayu dan memutuskan bahawa perayu telah dibuang kerja tanpa sebab dan alasan adil. Permohonan responden bagi semakan kehakiman dibenarkan oleh Mahkamah Tinggi, maka rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada seseorang yang dihukum dengan amaran tidak boleh dihukum bagi kesalahan yang sama dengan pembuangan kerja; (b) sama ada responden dalam kedudukan baik untuk menentukan keseriusan salah laku perayu; (c) sama ada hakim Mahkamah Tinggi yang bijaksana tersilap dalam memutuskan bahawa kesemua 11 tuduhan baru tidak diplid; (d) sama ada keterangan enam saksi yang dibawa oleh perayu telah dipertimbangkan oleh MP; (e) sama ada isu kondonasi adalah faktor penentuan oleh MP dalam membenarkan tuntutan perayu; dan (f) sama ada hakim Mahkamah Tinggi yang bijaksana tersilap kerana gagal untuk menilai bahawa kegagalan untuk menyerahkan tugas oleh perayu mendedahkan responden kepada kerugian seperti penghakiman ingkar dan tindakan mahkamah.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000 di mahkamah ini dan Mahkamah Tinggi; mengetepikan perintah Mahkamah Tinggi; dan mengembalikan semula dan memulihkan award MP:

(1) Ia tidak dibenarkan dari segi undang-undang untuk menghukum perayu dua kali bagi kesalahan yang sama. Berkaitan kepada perkadaran

hukuman, hak sedemikian tidak lagi terletak dalam bidang kuasa eksklusif majikan dalam sektor swasta pekerjaan. Hakim Mahkamah Tinggi yang bijaksana tersilap dalam memutuskan bahawa 11 tuduhan tersebut tidak diplid dengan itu tuduhan tersebut sebenarnya diplid tetapi fakta material tuduhan tersebut tidak diplidkan. Award pengerusi yang bijaksana MP menunjukkan bahawa beliau sememangnya mengambil kira keterangan saksi-saksi dan pengaduan kondonasi bukan alasan utama bagi memberikan award sedemikian. Berdasarkan atas keterangan, responden gagal untuk menunjukkan bahawa kegagalan untuk menyerahkan tugas secara betul telah mendedahkan responden kepada pelbagai tindakan undang-undang yang tidak memuaskan. Atas keseluruhannya, kes untuk pembuangan perayu tidak dibuktikan oleh responden; maka pembuangan kerja adalah tanpa sebab dan alasan adil (lihat perenggan 9–10, 18–19, 22–23, 25 & 28).

(2) Pengerusi MP yang bijaksana telah secara betul menjalankan tugasnya dalam menyiasat ke dalam kesesuaian alasan-alasan yang dikemukakan oleh responden apabila ia memutuskan untuk membuang perayu. Beliau mempunyai bidang kuasa yang perlu untuk menyimpang daripada hukuman yang dikenakan oleh majikan kerana keadaan yang mewajarkan hukuman drastik sedemikian tidak dibuktikan oleh responden di hadapannya. Memandangkan beliau tidak melakukan apa-apa kesilapan kehakiman, ia oleh itu adalah tidak terbuka bagi hakim Mahkamah Tinggi yang bijaksana untuk campur tangan dengan awardnya dengan mengeluarkan certiorari untuk membatalkannya (lihat perenggan 28).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1144–1222.

Cases referred to

Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361; [1999] 4 CLJ 155, CA (refd)

Continental Challenge Sdn Bhd & Ors v Loi Teh Ong [2003] 1 ILR 780, IC (refd)

Ghani & Co v Lisa Koh Hui Meng [2008] ILJU 381; [2008] 1 ILR 669, IC (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (folld)

Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 4 ILR 477, FC (folld)

Sunmugam Subramaniam v JG Containers (M) Sdn Bhd & Anor [1998] MLJU 656; [2000] 6 CLJ 521, HC (refd)
Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia [2011] 3 MLJ 454; [2011] 2 ILJ 545, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980
Industrial Relations Act 1967 s 20(3)

Appeal from: Application for Judicial Review No R2–25–169–08 of 2013 (High Court, Kuala Lumpur)

Atan Mustaffa Yussof Ahmad (Ainul Azam & Co) for the appellant.
Mahfuzah bt Mohd Faizi (Nurhayati & Mahfuzah) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Mashkon bin Hj Samuri ('the respondent') was formerly an employee of Orang Kampung Holdings (M) Sdn Bhd ('the applicant'). Parties are referred to as they were so referred to in the High Court for the judicial review application.

[2] The respondent's service was terminated by a one month notice of termination dated 20 March 2007, with effect from 21 March 2007. The respondent was also given a month pay by virtue of 'surat pengesahan jawatan' dated 1 April 2000.

[3] Prior to the notice of termination, an internal investigation was conducted in respect of three original charges against the respondent ie (i) failure to complete hand over duties to the acting factory manager, (ii) failure to use the punch card since 1 January 2007, and (iii) failure to comply with the instructions of the company in participating in a game in Majlis Sukan Melaka. Apart from these three original charges, an additional set of 11 new charges was slapped against the respondent, inter alia, for delay in remitting the workers' KWSP payments, the abandonment of broken waste water treatment, and pending to audit 2004 account until the end of 2006, etc. The respondent pleaded guilty for the three original charges but for the new 11 charges, the panel members of the disciplinary inquiry ('the DI') found that they were serious offences and the explanations given by the respondent were not acceptable. Thus, it was the view of the DI that the respondent's service with

the applicant must be terminated. So it had come to pass.

[4] Aggrieved by the termination, the respondent referred this matter to the Industrial Court ('the IC') pursuant to the provisions in the Industrial Relations Act 1967 ('the IRA'). On 11 July 2013, the IC found that the respondent was terminated without just and valid excuse, and that the dismissal was not an appropriate order under the circumstances of this case. The IC also awarded the respondent the sum of RM33,810 as a compensation, and backwages at RM57,960.

[5] Dissatisfied with the decision of the IC, the applicant company then filed an application for judicial review in Kuala Lumpur High Court to quash the decision of the award by the IC dated on 11 July 2013.

[6] On 27 February 2014, the learned High Court judge allowed the judicial review application as it was of the view that the dismissal by the applicant's company was with valid and just excuse. The learned High Court judge ordered the respondent employee to pay costs of RM5,000. Thus, this appeal by the respondent employee before us.

THE APPEAL

[7] We had heard both parties during the appeal. As stated in the memorandum of appeal, counsel for the respondent employee contended that the learned High Court judge had erred in law and in fact on the following:

(a) in failing to consider that the wrongful acts of the respondent as petty or did not hold that the failure to do a proper transfer of duties resulted in important information not being passed and exposed the applicant to losses and court actions;

(b) in failing to appreciate that the failure to hand over duty which was accused of was committed in January 2007 whereas the judgment in default and the court actions referred to by the learned High Court judge happened before the order of the transfer of duties in 2006;

(c) in failing to appreciate that there was no evidence by the applicant that failure to do a proper hand over duty resulted in important information not being passed and exposed the applicant to losses such as judgment in default and court actions;

(d) in failing to appreciate that the failure by the respondent in clocking his time card, the respondent was given warning and under the law a person who has been punished with warning could not be punished for the same offence with dismissal;

(e) in holding that as an employer the applicant is in the best position to determine the seriousness of the misconduct of the respondent in opposition of the legal principles in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 4 ILR 477;

(f) in applying the authority of *Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia* [2011] 3 MLJ 454; [2011] 2 ILJ 545 in respect of dismissal of a public office under the General Orders 1980 and not on dismissal of an employee under s 20(3) of the Industrial Relations Act 1967;

(g) in holding that all 11 new charges were not pleaded whereas in the Industrial Court it was held that the facts in respect of the 11 new charges were not pleaded. And not that the 11 new charges were not pleaded;

(h) in giving unjustifiable weight on the issue on whether the internal investigations conducted on the applicant could be revived (*dipulihkan*) by way of a de novo trial in the Industrial Court;

(i) in holding that the Industrial Court had erred in not taking into consideration six witnesses brought forward by the respondent whereas it is clear that the evidence of the six witnesses have been considered; and

(j) in holding that the Industrial Court had erred in taking into consideration the issue of condonation of the 11 new charges whereas the issue of 'condonation' was not the determining factor in allowing the respondent's claims.

[8] Having heard parties, we proceeded to deal with the various grounds stated in the memorandum of appeal, we had delved *all* of them for reason that will become obvious later on in this grounds of judgment. We will deal with the grounds that follow.

The learned High Court judge erred in law and in fact in failing to appreciate that the failure by the respondent in clocking his time card, the respondent was given a warning and under the law a person who has been punished with a warning could not be punished for the same offence with dismissal

[9] On this issue, it was not disputed that the respondent had been given letter of warning for his so-called recalcitrant conduct pertaining to the clocking in his time card. That was an admitted factual circumstance. The legal impact of that action by the applicant against the respondent would be that no further action could be taken against the respondent subsequently based on the *same* impugned conduct of not clocking in his time card. The evidence in this case had shown that after the warning letter was sanctioned against the respondent, there was no other intransigence committed by the respondent in

relation to clocking in of his time card. As such, as the respondent had been sanctioned by way of a warning letter pertaining to his breach of non-clocking in of his time card, no further or subsequent action could in law be taken against the respondent. In this case, the applicant had based its disciplinary action against the respondent on the same breach of non-clocking of his time card, for which he had been penalised, albeit by way of a letter of warning. We are in agreement with learned counsel that such an action of the applicant was not allowed by the law, as was clearly set out in the case of *Ghani & Co v Lisa Koh Hui Meng* [2008] ILJU 381; [2008] 1 ILR 669 where it was held by the court as follows:

> Even on the assumption that the contents of COB p 14 are true, this court finds that the respondent having issued the claimant with such a letter of warning which is a punishment itself cannot resile from it and convert the allegation of poor or unsatisfactory performance as stated in this letter of warning to be the foundation for its decision to terminate the services of the claimant subsequently for reason that this alleged poor or unsatisfactory performance is spent and irrelevant except that it can only be taken into consideration when deciding the quantum of punishment for any subsequent charge or charges. There is however no allegation of any subsequent charge or charges. This ground must necessarily fail.

[10] The learned chairman had duly recognised this as could be seen from her ruling on the issue in her award. By doing what the applicant had done, in fact, the respondent had been penalised twice for the same offence of non-clocking his time card for which he had been penalised, prior. To make it worse, it also had been made the basis for the respondent's dismissal. With due respect, that cannot, and ought not to be done as it has no legal wall to lean on. As such, in our view, it was erroneous on the part of the learned High Court judge to disturb the former's finding on the issue.

The learned High Court judge erred in law and in fact in holding that as the employer the applicant company was therefore in the best position to determine the seriousness of the misconduct of the respondent thereby acting in opposition of the legal principles laid down in the Federal Court case of Norizan bin Bakar v Panzana Enterprise Sdn Bhd; and

The learned High Court judge erred in law and in fact in applying the authority of Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia in respect of dismissal of a public officer under the General Orders 1980 and not on dismissal of an employee under s 20(3) of the Industrial Relations Act 1967

[11] We shall deal with these two grounds together as they dealt with the same issue, an issue that is of great significance as it would impact on the kind of punishment that ought to be visited upon the respondent. In fact, this matter goes to the fundamental root of the matter as regards the kind of punishment that ought to be meted on the respondent. The principle in the Federal Court case of *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537;

[1995] 4 CLJ 449 ('*Milan Auto* case') is aimed directly at this issue, especially the second limb of the principle where it has been said that having established the *factum* of misconduct on the part of the employee, the IC would then proceed on to consider 'whether the proven misconduct constitutes a just cause or excuse for the dismissal'. In other words, dismissal from employment has been metaphorically likened to the death sentence in a capital offence case. Indeed, it has dire consequences on an employee's livelihood. So, it is important for the IC to see whether on the totality of the circumstances, the proven misconduct committed by the errant employee deserves the punishment of dismissal. An employee comes to the IC for justice and it has been said time and again that the IC is enabled by statute to exercise equity in deserving cases. To say that the matter of punishment resides solely and wholly within the province of the employer's domain is effectively to deny the scope of justice which the IC can dispense justice in a case brought before it.

[12] We were referred to the recent decision of the Federal Court in the *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 4 ILR 477 ('*Panzana* case') where it was held that the IC can review the punishment that was meted out by the employer against the employee. We now reproduce the essential part of that important decision which in effect has reiterated what had been the correct and desirable legal position impacting on the area of punishment in employment law jurisprudence:

> ... we are of the view that the doctrine of proportionality of punishment is already in-built into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[13] In fact, in the case of *Sunmugam Subramaniam v JG Containers (M) Sdn Bhd & Anor* [1998] MLJU 656; [2000] 6 CLJ 521, the learned Faiza Thamby Chik J had occasion to say this:

> A perusal of the award would reveal that the Industrial Court in this instant case had totally failed to perform its main duty in the second limb of its twofold function as set out in *Milan Auto*. In other words, the Industrial Court failed to address its mind as regards the harshness or severity of punishment. The Industrial Court had committed a jurisdictional error of law.

[14] The error in this approach of giving exclusive power to the employer to decide on the kind of punishment which is beyond judicial scrutiny could have been caused by the mistaken adherence to what was stated in the dissenting judgment of learned NH Chan JCA (as he then was) in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 ('*Tan Tek Seng* case') a case involving a dismissal from government employment of a public officer under the General Order 1980. In his dissenting judgement, the learned Justice NH Chan had stated that in the matter of meting out the

punishment against the employee found guilty of misconduct, it resided within the exclusive domain of the employer, as it was rationalised that the employer would know how best to manage the affairs of the company, including matters pertaining to personnel issues. That approach, with respect, is only relevant in cases involving disciplinary cases in the arena of public service employment, but not in the private employment sector.

[15] In this case, it was clear that the learned High Court judge had followed the decision in the case of *Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia* [2011] 3 MLJ 454; [2011] 2 ILJ 545 ('*Subramanyah* case') . In that case, the Court of Appeal had agreed with learned Justice NH Chan JCA's dissenting view in the *Tan Tek Seng* case and had gone on to say:

> There is no express provision relating to the right to mitigate upon punishment accorded to the employees in the terms and conditions of their employment with BNM. Therefore, the irresistible conclusion is that no such right ought to be meted to the appellant. In any event, the court is satisfied that the representation or mitigation made by the appellant in his appeal to the Governor of BNM before the punishment was affirmed, is sufficient.

[16] The court then went on to say:

> The court is satisfied that the BNM's decision to dismiss the respondent and all the five charges of misconducts against him was a reasonable decision in view of the circumstances of the case. His misconducts are serious in nature. Being the employer, BNM is the best position to determine the seriousness of the appellant's misconducts. In this respect the court is in full agreement with NH Chan JCA (dissenting) in the case of *Tan Tek Seng* case, when he said:
>
> > The correct test is: Was it reasonable for the employers to dismiss him? If not reasonable employer would have dismiss him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view another quite reasonably take different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers many not have dismissed him.

[17] Having followed the *Subramanyah* case the learned High Court judge had concluded as follows: 'Justeru, sebagai majikan, pemohon adalah dalam kedudukan terbaik untuk menentukan tahap keseriusan salah laku responden'. (See pp 12–14 additional record of appeal.)

[18] With respect, we agreed with learned counsel for the respondent that the learned High Court judge had misdirected herself on the law on this

important point pertaining to proportionality of punishment. That right is no longer residing within the exclusive province of the employer in the private sector employment.

The learned High Court judge erred in law and in fact in holding that all 11 new charges were not pleaded whereas in the Industrial Court it was held that the facts in respect of the 11 new charges were not pleaded. And not that the 11 new charges were not pleaded

[19] On this issue, we were in agreement with the submissions of learned counsel for the respondent that the learned High Court judge had misinterpreted the factual matrix surrounding this issue thereby leading her to her erroneous finding. What had transpired had been that the 11 charges were pleaded but the material facts pertaining to those new 11 charges were not pleaded. In fact, the learned chairman of the IC had adverted to this situation in her award, thereby leading her to conclude that the failure to plead the material facts, had prejudiced the respondent in that he was put to disadvantage in putting up his answers to the 11 new charges. As is trite, pleadings require that the material facts be pleaded for reasons that must be obvious to law practitioners. It would not be sufficient to just plead the 11 new charges. Particulars that would materially constitute the charges would need to be pleaded with sufficient clarity. Failure to abide by that crucial rule on pleadings would dis-entitle the pleader to lead evidence on the same for the purpose of establishing purported charges. That was had happened in this case. There had simply been adherence to the basic requirement pertaining to pleading of material facts pertaining to the 11 new charges. The law is clear on this matter. The law of pleadings applies with full force in Industrial Court cases as it does to civil litigation. This can be seen in the case of *Continental Challenge Sdn Bhd & Ors v Loi Teh Ong* [2003] 1 ILR 780 where it was held that pleadings must contain material facts. The material facts in the pleadings should state those facts which will put the respondents on their guard and tell them what they ought to meet. It was held that parties were bound by their pleadings and generally are not permitted to raise an issue if not pleaded.

[20] The learned chairman of the IC had ruled in her award as follows:

> Failing to plead these facts relating to the 11 new charges framed against the claimant are important in that they affected the claimant's tenure with the company amongst other things, the court applying the principles of equity and good conscience shall disregard them. The court accordingly rejects the evidence that the company adduced during the hearing to prove these 11 new charges.

[21] We were of the view that the learned chairman of the IC had addressed that issue pertaining to the 11 new charges properly. We saw no valid reason as

to why the learned High Court judge should have disturbed her finding on that issue relating to the 11 new charges. We were of the view that she had fallen into error by doing that.

The learned High Court judge erred in law and in fact in holding that the Industrial Court had erred in not taking into consideration six witnesses brought forward by the respondent whereas it is clear that the evidence of the six witnesses have been considered

[22] The award handed down by the learned chairman of the IC showed that she had indeed taken into account the evidence of the witnesses and had subjected the evidence to quite a detailed analysis as can be seen in her award. It was therefore, not justified for the learned High Court judge to conclude in such a manner as it was against the clear record as appeared in the award of the learned chairman of the IC. Again, the learned High Court judge had erroneously interfered with the award when there was no reason for such an interference. This had amounted to a misdirection on the part of the learned High Court judge.

The learned High Court judge erred in law and in fact in holding that the Industrial Court had erred in taking into consideration the issue of condonation of the 11 new charges whereas the issue of 'condonation' was not the determining factor in allowing the respondent's claims

[23] We agreed that this ground was not the main reason for the granting of the award. It was not pleaded by the respondent. The learned IC chairman only made a passing remark on the evidence which would appear to her to show condonation on the part of the applicant. It was therefore wrong for the learned High Court judge to fault the IC by saying that she had made her award based on an unpleaded complaint or cause of action of condonation on the part of the applicant. It was clear to our mind that the ground for the granting of the award was something else, and it was not condonation.

The learned High Court judge erred in law and in fact in failing to appreciate that the failure to hand over duty which was accused of was committed in January 2007 whereas the judgment in default and the court actions referred to by the learned High Court judge happened before the order of the transfer of duties in 2006

[24] In regard to this ground of appeal, there was a clear misdirection on the part of the learned High Court judge on the evidence such that she had arrived at a wrong conclusion. Looking at the notes of proceedings, it was clear to us that, there was merit in the complaint raised by learned counsel for the respondent employee. There was clear a mis-location of the evidence by the learned High Court judge thereby leading her to link the two events erroneously. The evidence did not allow her to come to that conclusion as there was in effect, no nexus to justify her conclusion.

The learned High Court judge erred in law and in fact in failing to appreciate that there was no evidence by the applicant that failure to do a proper hand over duty resulted in important information not being passed and exposed the applicant to losses such as judgment in default and court actions

[25] Having perused through the evidence as led in the IC, we were in the agreement with the respondent's counsel that the applicant had failed to show that the failure to hand over duty properly had in fact resulted in important information not being passed to the applicant thereby exposing the applicant to various unfavourable legal actions.

[26] As had been alluded to earlier, we were aware of the other grounds that were advanced by the respondent in his memorandum of appeal in his quest to challenge the decision of the learned High Court judge. But we were of the view that the grounds that were dealt by us in the preceding paragraphs would be sufficient reasons for us to allow this appeal with costs. We therefore would not dwell on them save to indicate that we had given them our due consideration as well.

THE DECISION OF THIS COURT

[27] It was therefore apparent to us that the learned High Court judge had erred in disturbing the award that was handed down by the learned chairman of the IC by issuing a certiorari thereby quashing the award. It was our considered view that the learned chairman of the IC had not committed any jurisdictional error in coming to her decision the way she did, so as to justify the learned High Court judge to issue the certiorari against her award given in favour of the respondent employee. Her role in a judicial review application ought not to be performed as if she was hearing an appeal, where issues could be opened to be re-ventilated by way of rehearing. As a review court, that role that would be more limited in its scope and as such, more circumscribed. On that note, it would be opportune for us to reproduce the relevant portion of the judgement of this court in the case of *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361; [1999] 4 CLJ 155 Shaik Daud Ismail JCA said on behalf of the panel at p 364 (MLJ); p 159 (CLJ) as follows:

> After reviewing the award of the Industrial Court, the High Court was of the view that the Industrial Court had made a proper evaluation of all the evidence before it and therefore the High Court was of the view that the Industrial Court's conclusion that the dismissal of the respondent was without just cause or excuse, was proper. The High Court found no reason to interfere with the award and dismissed the appellant's application with costs.
>
> It is our view that although the High Court is not acting in its appellate capacity in reviewing awards of the Industrial Court, it nevertheless should not interfere in the Industrial Court's findings of facts. In this case, the Industrial Court after hearing

evidence from witnesses, came to a finding of fact on the alleged reasons for the dismissal by the appellant in their letter of 17 September 1990 dismissing the respondent, gave two reasons for the dismissal. It is therefore incumbent on the Industrial Court to determine whether the appellant had shown by evidence that these two reasons exist to justify the dismissal. In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, the Federal Court at p 136 held:

> When representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

[28] Based on the above reasons adverted to by us, we were in agreement with learned counsel for the respondent that there was no just and valid excuse on the part of the applicant to dismiss the respondent in the circumstances. The case for a dismissal against the respondent had not been established by the applicant. As such, we had set aside the order of certiorari issued by the learned High Court judge purportedly to quash the award granted by the learned chairman of the IC. The learned chairman of the IC had correctly exercised her duty in inquiring into the propriety of the reasons that were advanced by the applicant when it decided to dismiss the respondent. She had made the findings of facts after hearing the witnesses led by both parties and had preferred the evidence of the respondent by assigning cogent reasons for making those findings. At the end of the day, she found that there was no valid and just excuse for the applicant to mete out that kind of punishment against the respondent. On account of the *Milan Auto* case and lately reiterated by the *Panzana* case she had the necessary jurisdiction to depart from the punishment that was meted out by the employer as the circumstances warranting such a drastic punishment were not established by the applicant before her. As she had not committed any jurisdictional error, it was therefore not open for the learned High Court judge to disturb her award by issuing a certiorari to quash the same.

[29] In the upshot, premised upon the above, we had therefore unanimously allowed the appeal by the respondent with costs of RM15,000 for both here, and below. The order of the High Court judge dated 27 February 2014 was set aside and the award of the Industrial Court dated 11 July 2013 was therefore reinstated and restored. We also had ordered the deposit to be refunded to the respondent employee who was the appellant in this appeal before us.

Appeal allowed with costs of RM15,000 here and below; order of High Court set aside; and award of IC reinstated and restored.

Reported by Dzulqarnain Ab Fatar